U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0186
and 14-0186A

THOMAS C. FANNON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION/CERES TERMINALS	)	DATE ISSUED: June 7, 2016
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order - Award of Medical Treatment & Partial Disability Award of Temporary Total Disability Compensation and the Supplemental Decision and Order - Denial of Requests for Reconsideration & Partial Modification of Compensation Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Arnold, Sevel & Gay, P.A.), Towson, Maryland, for claimant.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals[1] the Decision and Order - Award of Medical Treatment & Partial Disability Award of Temporary Total Disability Compensation and the Supplemental Decision and Order - Denial of Requests for Reconsideration & Partial Modification of Compensation Order (2012-LHC-01354, 01355, 01356) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged he sustained injuries during the course of his employment for employer as a driver on September 5, 2006, April 28, 2007, December 2, 2007, and September 17, 2009. Claimant asserted that these injuries aggravated a pre-existing arthritic condition, accelerated his degenerative joint disease, and led to his stopping work on September 28, 2011. Decision and Order at 3. Claimant sought authorization for left shoulder replacement surgery, 33 U.S.C. §907, and additional temporary total and partial disability benefits, 33 U.S.C. §908(b), (e). Employer controverted the claim.

In his decision, the administrative law judge found that claimant sustained work-related injuries to his left shoulder on September 5, 2006, April 28, 2007, December 2, 2007, and September 17, 2009.[2] Decision and Order at 47, 53, 56. Claimant underwent left shoulder surgery on February 12, 2010, for a degenerative labrum tear, degenerative changes in the biceps tendon and glenohumeral joint, and a large rotator cuff tear; claimant returned to work in August 2010. *Id*. at 61. The administrative law judge found

[1] The Board acknowledged the parties' appeals on July 15, 2014; however, the Board did not receive the record from the district director. By Order issued March 18, 2015, the Board dismissed the appeals and remanded for the district director to reconstruct the record. The Board received the reconstructed record on October 19, 2015. By Order issued on January 15, 2016, the Board reinstated both appeals on the Board's docket.

[2] The administrative law judge stated that the parties entered into a Section 8(i) settlement, 33 U.S.C. §908(i), for the December 2007 injury in which the parties agreed that claimant injured his left shoulder and that the injury had resolved. Decision and Order at 55; *see* EX 72. Employer had paid claimant temporary total disability benefits from December 3, 2007 to February 12, 2008, based on an average weekly wage of $1,625.17. Decision and Order at 57. The administrative law judge found that by the date of the settlement agreement on February 23, 2010, claimant's left shoulder injury associated with this accident had resolved. *Id*. at 56.

that, thereafter, claimant only occasionally drove hustlers due to his shoulder condition, and that most of his work involved driving transportation vans for workers employed to drive cars off and on ships.[3] *Id*. at 62.

The administrative law judge found that, on his last day of work on September 28, 2011, claimant experienced an increase in the intensity of his long-standing shoulder symptoms and a worsening of his left shoulder numbness and pain. Decision and Order at 62-63. The administrative law judge found that, prior to this date, claimant had been working with chronic shoulder pain and had experienced periodic shoulder numbness since "about July 2011." *Id*. at 62. The administrative law judge found that, in the absence of "something suddenly and unexpectedly going wrong with his body," claimant did not sustain a new work-related injury on September 28, 2011. *Id*. However, the administrative law judge found, in the absence of employer's rebutting the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's worsening left shoulder numbness and severe pain on September 28, 2011, were the natural consequence of claimant's prior work-related left shoulder injuries on September 5, 2006, April 28, 2007, and September 17, 2009. *Id*. at 64-65.

The administrative law judge found that claimant requires left shoulder replacement surgery due, in part, to his work-related injuries, and he awarded claimant medical benefits for this procedure. Decision and Order at 67, 70. The administrative law judge rejected claimant's contention that he is entitled to additional compensation for temporary total disability from September 18, 2009 to August 3, 2010, finding claimant's claim for the September 2009 injury barred under the Section 13 statute of limitations, 33 U.S.C. §913, because claimant did not file a claim for additional disability compensation within one year of August 3, 2010, when employer last paid compensation for this injury. *Id*. The administrative law judge also rejected the claim for temporary partial disability compensation from August 4, 2010 to September 28, 2011, because claimant did not file a claim for this loss of wage-earning capacity after he returned to work on August 4, 2010.[4] *Id*. at 72. The administrative law judge found that claimant established he has been unable to return to work since September 28, 2011, because employer's written description of claimant's driving job includes the frequent use of both hands and Dr. Alegado opined that claimant is unable to return to work due to his left shoulder condition. *Id*. at 77. In the absence of any evidence of suitable alternate employment, the

[3] The administrative law judge stated that Dr. Alegado restricted claimant from driving fifth wheels in February 2011. Decision and Order at 62.

[4] The administrative law judge also found that claimant failed to establish a loss of wage-earning capacity after he returned to work in August 2010 that was due to his shoulder condition. *Id*. at 74-75.

administrative law judge found claimant entitled to continuing temporary total disability benefits from September 28, 2011. *Id*. at 78; 33 U.S.C. §908(b). The administrative law judge based claimant's average weekly wage of $1,252.14 on the wages he earned prior to the September 17, 2009 work injury. Decision and Order at 79; 33 U.S.C. §910(c).

Claimant and employer both moved for reconsideration. The administrative law judge granted employer's motion insofar as he modified his initial order to provide that claimant's temporary total disability compensation arose from the natural consequences of only the September 5, 2006 and April 28, 2007 work injuries because the September 17, 2009 claim is time-barred. Supp. Decision and Order at 5. The parties' other contentions were rejected. Both parties appeal the administrative law judge's decisions.

On appeal, employer contends the administrative law judge erred: by not finding that the time-barred 2009 work injury is an intervening cause of claimant's disability that terminated its compensation liability; by finding that claimant's disability is due to the natural progression of the September 2006 and April 2007 injuries; in finding claimant cannot return to his usual work; and, in calculating claimant's average weekly wage.[5] Employer's Brief at 21-34. Claimant responds, urging rejection of employer's appeal. Employer and claimant each filed several additional briefs.[6] In his cross-appeal,[7]

[5] Employer also contends that the administrative law judge erred by not rendering his findings in accordance with the Administrative Procedure Act. Employer does not raise any specific instance of error in this regard. *See* Pet. for Rev. at 33-35. A review of the administrative law judge's 84-page decision shows that the administrative law judge thoroughly discussed the evidence and applied it to the issues raised by the parties. In the absence of employer raising any specific error for the Board to review, employer's argument is rejected. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41 (2d Cir. 2001); *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997).

[6] In this respect, employer moves to strike claimant's response to its second reply brief. We grant employer's motion as claimant previously filed two responses to employer's appeal. 20 C.F.R. §802.215.

[7] Employer also contends that claimant's cross-appeal was not timely filed. A cross-appeal must be filed within 14 days of the date the first notice of appeal was filed or within 30 days of the filing of the administrative law judge's decision by the district director, whichever period last expires. 33 U.S.C. §921(a); *see also* 20 C.F.R. §802.205. In this case, the district director filed the administrative law judge's decision on reconsideration on March 26, 2014. Claimant's notice of cross-appeal to the Board was dated April 22, 2014, and received by the Board on April 24, 2014. Accordingly,

claimant contends the administrative law judge erred in finding that claimant did not sustain a new work injury on September 28, 2011. Employer responds that this contention should be rejected.

We first address claimant's contention that the administrative law judge erred in finding that the worsening of claimant's shoulder symptomology on September 28, 2011, did not constitute a work-related "injury" under the Act.

In his decision, the administrative law judge found that claimant "experienced an increase in, and worsening of, left shoulder numbness and pain" on September 28, 2011. Decision and Order at 63. However, the administrative law judge found that claimant did not sustain a work-related injury on that day because "something suddenly and unexpectedly" did not go wrong with claimant's shoulder.[8] *Id.* at 62. On reconsideration, the administrative law judge rejected claimant's argument that he sustained a work injury on September 28, 2011. Supp. Decision and Order at 4. The administrative law judge reiterated that claimant demonstrated that "no exacerbating incident occurred at work," and that instead his complaints that day "represented a gradual, and eventually disabling, increase in the intensity of his long-standing shoulder symptoms." *Id.*

In order for the Section 20(a) presumption to apply, claimant must at least allege that his work caused his harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008). In this case, on October 27, 2011, claimant filed a claim stating that on September 28, 2011, he "developed numbness in left shoulder down left arm." CX 40. Employer controverted the claim, alleging that claimant only filed the claim after, on October 20, 2011, employer controverted a claim

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claimant's cross-appeal was timely filed. 20 C.F.R. §§802.205(a), (b), 802.206(a), (d), (e).

[8] In general, the administrative law judge's statement that claimant did not sustain an "injury" on September 28, 2011, because "something suddenly and unexpectedly" did not "go wrong" with claimant's shoulder is overbroad. It is well-established that if the conditions of a claimant's employment cause him to become symptomatic, the claimant has sustained an injury within the meaning of the Act. *See Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *see generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 308 (9th Cir. 1986).

for the 2009 injury based on the expiration of the statute of limitations. EXs 32, 41-43. In his answers to employer's interrogatories, dated July 6, 2012, claimant stated that he did not suffer a new injury on September 28, 2011, but experienced a flare-up of the symptoms resulting from the September 5, 2006 injury and that he is claiming temporary total disability from September 28, 2011, "when he was obliged to stop work because of the increase in shoulder symptoms and the need for shoulder replacement surgery, all resulting from the injury of September 5, 2006." EX 60 at 5-6. At his deposition on July 9, 2012, claimant was asked "Was there anything in particular that happened, on September 28, 2011, while you were driving the van?" He answered, "Yes. My left arm went numb. But it wasn't just that day. It had been occurring, but it was really bad that day. . . ." EX 63 at 30. During his opening statement at the formal hearing on August 1, 2012, claimant's counsel stated claimant developed numbness on September 28, 2011. The administrative law judge asked counsel, "So, you don't think September 11 (sic) is an injury." Counsel responded, "No, it was not an injury." Tr. at 37. In his testimony, claimant reiterated what he had said at his deposition – nothing particular happened, he had been experiencing pain and numbness for a while, and it was particularly bad on September 28, 2011, so he stopped working. Tr. at 83-84.

Based on this record, we hold that claimant failed to allege that a work incident occurred or working conditions existed on September 28, 2011, that could have aggravated his shoulder condition; rather, claimant and his attorney specifically alleged that the symptoms were due to a prior injury. Moreover, substantial evidence in the form of claimant's testimony supports the administrative law judge's finding that claimant merely reported increased pain that day, which had been building gradually over the prior few months. Therefore, we reject claimant's contention of error and affirm the administrative law judge's finding that claimant did not establish the occurrence of a work injury on September 28, 2011. *See U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631.

Employer contends the administrative law judge erred in finding that claimant's disability is compensable. Employer's contention is two-fold: (1) its liability was terminated because the claim for the 2009 injury is time-barred; and (2) the administrative law judge erred in finding that claimant's disability is due to the natural progression of the September 2006 and April 2007 work injuries. In his decision, the administrative law judge addressed whether claimant's disability as of September 28, 2011, is related to his prior employment injuries. The administrative law judge found that claimant's disabling shoulder symptoms may be compensable if they are the natural consequence of his prior work-related injuries. Decision and Order at 62. In this regard, the administrative law judge found in his first decision that claimant's prior injuries on September 5, 2006, April 28, 2007, and September 17, 2009, "may have led to a worsening of left shoulder symptoms on September 28, 2011," *id*. at 64, as they involved "either direct damage to Mr. Fannon's left shoulder . . . or exacerbation of physical

changes in his left shoulder," *id*. at 63. He thus found claimant entitled to the Section 20(a) presumption that his disability is due to his prior work injuries, which employer did not rebut. 33 U.S.C. §920(a). Accordingly the administrative law judge found that claimant's disabling left shoulder condition is the natural consequence of claimant's prior work injuries in September 2006, April 2007 and September 2009. Decision and Order at 65.

On reconsideration, the administrative law judge rejected employer's contention that the September 2006 and April 2007 injuries did not cause claimant's disability. Supp. Decision and Order at 3. Additionally, the administrative law judge rejected employer's contention that the time-barred September 2009 injury precludes claimant from being awarded compensation commencing September 28, 2011. The administrative law judge found that the September 2006 and April 2007 injuries alone are a sufficient basis for claimant's temporary total disability award notwithstanding that the September 2009 work injury is not compensable, and he modified the award to provide that claimant's disability after September 28, 2011, is due to the natural progression of these two work injuries. *Id*. at 4.

It is well established that employer remains liable for the natural progression of a work-related injury. *See, e.g., Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *see* 33 U.S.C. §902(2). We reject employer's contention that the administrative law judge erred in applying the Section 20(a) presumption to determine whether claimant's disability after September 28, 2011, is related to the natural progression of his prior work injuries, as this issue is one of causation to which Section 20(a) applies.[9] *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). We also reject employer's contention that the time-barred September 2009 work injury is an intervening cause of claimant's disability that precludes employer's liability for additional benefits. A time-barred claim for a work-related injury does not relieve employer of liability for claimant's subsequent disability so long as the disability results from the natural progression of work injuries prior to September 2009.[10] *See generally Emery*, 228 F.3d 513, 34 BRBS 91(CRT); *see*

[9] In this respect, employer's citation of *Ins. Co. of the State of Pennsylvania v. Director, OWCP* [*Vickers*], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013) is inapposite. *Vickers* involved a "secondary condition" and not a disability allegedly due to the natural progression of a prior work injury.

[10] We, therefore, also reject employer's assertion that the December 2007 work injury is an intervening cause of claimant's ultimate shoulder disability. Moreover, the administrative law judge rationally found that the injury claimant sustained in December 2007 resulted in increased shoulder pain, but that it did not aggravate claimant's pre-existing arthritic shoulder condition or his partial rotator cuff tear. Decision and Order at

also Jackson v. Strachan Shipping Co., 32 BRBS 71(1998) (Smith, J., concurring in pert. part and dissenting in part); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994). In this case, the administrative law explained at length the basis for his findings regarding the damage each injury caused to claimant's shoulder. Decision and Order at 63-64; Supp. Decision and Order at 3-4. Substantial evidence supports his finding that the September 2006 and April 2007 injuries caused different harm to claimant's shoulder than did the 2009 injury. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Employer further contends there is no evidence that the 2006 and 2007 work injuries caused claimant's current disability because claimant returned to his usual employment after these injuries. In finding claimant entitled to the Section 20(a) presumption, the administrative law judge credited the opinions of Drs. Levine and Friedler to find that the September 2006 work injury caused a torn left shoulder bicep tendon and exacerbations of left shoulder osteoarthritis and degenerative labrum.[11] Decision and Order at 48-49, 63. The administrative law judge credited the opinion of Dr. Shepard to find that the April 2007 work injury caused an exacerbation of a pre-existing rotator cuff tendinopathy tear and glenohumeral AC joint arthritic condition.[12] *Id*. at 52-53, 63. A November 2011 x-ray and an October MRI revealed "substantial arthropathy," "bone-on-bone loss of joint space," "sclerosis on the glenoid," and a large osteophyte on the "inferior aspect of the humerus." EXs 52, 53. The MRI showed that the rotator cuff tendon "overall appears intact." *Id*. Dr. Matz opined in December 2011 that claimant had longstanding, progressive degenerative changes in his shoulder. EX 55. From this evidence, the administrative law judge reasonably concluded that the Section 20(a) presumption applies to link claimant's disabling symptoms after September 28, 2011, in part, to the 2006 and 2007 work injuries. *See generally Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Employer's contention that, only after the 2009 injury was claimant unable to work as a hustler driver, does not render improper the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption. Accordingly, we affirm the administrative law judge's finding that

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56-57; *see generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

[11] Dr. Levine examined claimant's shoulder on October 11, 2006, and performed arthroscopic surgery on December 8, 2006. CX 9 at 2, 5. Dr. Friedler examined claimant on November 6, 2006. EX 20 at 2, 6.

[12] Dr. Shepard examined claimant on August 17, 2007 and November 9, 2007. CX 14 at 1-2.

claimant is entitled to the Section 20(a) presumption linking his disability commencing September 28, 2011, to the September 2006 and April 2007 work injuries. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013).

Employer next contends that the opinions of Drs. Matz and Marchant rebut the Section 20(a) presumption, because they opined that claimant's shoulder condition is due to non-work-related osteoarthritis. The administrative law judge found that Dr. Matz's opinion does not rebut the Section 20(a) presumption because he did not offer an opinion on whether the worsening of claimant's shoulder symptoms as of September 28, 2011, was related to the September 2006 and April 2007 injuries. Decision and Order at 64. In his report, Dr. Matz opined only that claimant had longstanding and progressive degenerative changes that did not have any causal relationship to the September 17, 2009 injury and to the pain and numbness that arose on September 28, 2011. EX 55. Dr. Marchant examined claimant on November 21, 2011. EX 53. He stated that claimant had "end stage arthroplasty, a large osteophyte contributing to his loss of motion, and pain consistent with shoulder arthritis," and he recommended shoulder replacement surgery. *Id.* at 2. Dr. Marchant's report does not address the effects of claimant's work injuries on his shoulder condition. Since neither doctor addressed whether the 2006 and 2007 work injuries contributed to the worsening of claimant's symptomatology in September 2011, these opinions cannot rebut the presumption. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). Accordingly, as the administrative law judge's finding that employer did not rebut the Section 20(a) presumption is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's disability after September 28, 2011, is due, in part, to the natural progression of his 2006 and 2007 work injuries. *Id.*

Employer argues that, if claimant's disability is related to his prior injuries, then his average weekly wage should be based on his wages at the time of the last injury that contributed to the disability. The administrative law judge based claimant's average weekly wage of $1,252.14 on his earnings prior to the September 17, 2009 work injury. Decision and Order at 80-81. We agree that this is erroneous given that the claim for an injury occurring on September 17, 2009, was not timely filed and does not form the basis for claimant's compensable claim.

In cases of subsequent disability with no new injury, average weekly wage is to be based on the wages prior to the date of injury. *See LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Director, OWCP v. General Dynamics Corp.* [*Morales*], 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Inasmuch as the administrative law judge found on reconsideration that claimant's disability in September 2011 was due, in part, only to his work injuries in

2006 and 2007, the average weekly wage for claimant's temporary total disability award commencing September 28, 2011, should be based, as employer contends, on claimant's earnings prior to his last contributing work injury on April 28, 2007. Because the administrative law judge did not determine claimant's average weekly wage at this time, we vacate the administrative law judge's temporary total disability award based on claimant's average weekly wage at the time of the 2009 work injury and remand for the administrative law judge to redetermine claimant's average weekly wage at the time of the April 28, 2007 injury. 33 U.S.C. §910; *see LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT); *McKnight*, 32 BRBS 165.

Employer further contends the administrative law judge erred in finding claimant established he cannot return to his usual employment as a van driver. Claimant's "usual work" is that which he was doing at the time of injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In this case, the compensable injuries occurred in 2006 and 2007 when claimant was a fifth wheel driver. The administrative law judge found that Dr. Alegado restricted claimant from driving fifth wheels in February 2011. Decision and Order at 62; CX 15 at 10. Thus, claimant has established his prima facie case of total disability as to the 2006 and 2007 injuries. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Chappell*], 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979).

Once a claimant establishes that he is unable to perform his usual work, as here, the burden shifts to the employer to demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. Employer may offer the claimant suitable employment in its facility or may establish the availability of realistic job opportunities on the open market that the claimant could secure if he diligently tried. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984).

In this case, the van driver position was suitable alternate employment until September 28, 2011. The administrative law judge noted claimant's testimony that he generally was able to perform this job with only his right arm and hand, but, due to his increasing left shoulder symptoms, he no longer believed he could safely do so. Decision and Order at 77; *see* Tr. at 88-89. The administrative law judge also noted the testimony of Anthony Buccini, employer's terminal manager, that one functioning arm is sufficient to perform claimant's van driving duties. Tr. at 156-157. The administrative law judge found that the actual job description of claimant's van driver job was the most probative evidence for determining his duties. The job required frequent working with hands at waist level on the steering wheel. Thus, the administrative law judge found that a van

driver must have the ability to fully use both arms. Decision and Order at 77; *see* EXs 14 at 27; 17 at 4; 18 at 7; 20 at 10.

The administrative law judge also credited the October 2011 opinion of Dr. Alegado that claimant should not return to work due to his left shoulder pain over the opinion of Dr. Matz, who checked "yes" on a form asking whether claimant could return to work after September 28, 2011 until such time as he had surgery. Decision and Order at 77; *see* CX 15 at 11-12; EX 64. The administrative law judge found that Dr. Alegado gradually imposed work restrictions on claimant over the course of his examinations, and he found that Dr. Alegado more fully understood the physical requirements of claimant's job duties as a van driver.[13] Decision and Order at 78. Moreover, Dr. Alegado noted, at his last examination on October 3, 2011, that claimant's pain level is "severe" with rotation, whereas Dr. Matz did not note claimant's pain level. *Compare* CX 15 at 11 *with* EX 55. The administrative law judge thus found that he was unable to assess whether Dr. Matz's conclusion that claimant could return to work as a van driver is consistent with his physical findings during the examination.[14] The administrative law judge found that Dr. Alegado's diagnosis of severe left shoulder rotational pain supports claimant's representation of his inability to use his left arm. Accordingly, substantial evidence supports the administrative law judge's finding that the van driver position was no longer suitable for claimant. In the absence of any other evidence of suitable alternate employment, we affirm the administrative law judge's conclusion that claimant is entitled to compensation for temporary total disability from September 28, 2011. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

[13] Dr. Alegado treated claimant's shoulder 10 times from October 5, 2009 to October 3, 2011. CX 15.

[14] Dr. Matz examined claimant on December 13, 2011, and responded on July 24, 2012 to employer's inquiry on claimant's work status. EXs 55, 64.

Accordingly, the administrative law judge's average weekly wage finding is vacated and the case is remanded for the administrative law judge to determine claimant's average weekly wage as of his April 28, 2007 work injury. 33 U.S.C. §910. In all other respects, the administrative law judge's Decision and Order - Award of Medical Treatment & Partial Disability Award of Temporary Total Disability Compensation and the Supplemental Decision and Order - Denial of Requests for Reconsideration & Partial Modification of Compensation Order are affirmed.

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge